No. 82-1828

In The
Supreme Court of the United States
October Term, 1982

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Petitioner,

vs.

NORTHERN PLAINS RESOURCE COUNCIL,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether the Court of Appeals properly construed Clean Air Act Section 307(f), 42 U. S. C. Section 7607(f), by awarding attorneys fees to respondent even though they did not prevail on the merits.

II. Whether the petition for a writ of certiorari was filed within the time provided by law.

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STATEMENT

The United States Environmental Protection Agency ("EPA") has petitioned this Court for a Writ of Certiorari seeking review of an order entered by the Court of Appeals for the Ninth Circuit awarding attorneys fees to the Northern Plains Resource Council ("NPRC"). *Northern Plains Resource Council v. United States Environmental Protection Agency,* 670 F.2d 847 (9th Cir. 1982) (Pet. App. A). In that case NPRC had unsuccessfully challenged a permit issued under Part C, subpart I of the Clean Air Act, 42 U.S.C. (Supp. IV) 7470-7479, to a consortium of

electric power utilities to construct what are known as "Colstrip Units 3 and 4." *Northern Plains Resource Council v. United States Environmental Protection Agency*, 645 F. 2d 1349 (9th Cir. 1981). Thereafter, NPRC sought attorneys fees pursuant to § 307(f) of the Clean Air Act, 42 U. S. C. (Supp. IV) 7607(f). On March 1, 1982 the court of appeals ordered EPA to pay NPRC its attorneys fees stating that "this is precisely the type of suit Congress sought to encourage by enacting § 307(f)." (Pet. App. A at 3a).

In its March 1, 1982 order, the court of appeals directed NPRC to file a motion specifying the amount of fees sought (Pet. App. A at 3a). Subsequently NPRC and EPA stipulated and agreed that $15,000 was a reasonable amount for the fees. The court of appeals was advised of this agreement on March 27, 1982 by EPA and again on March 31, 1982 by NPRC (Apps. A and B). That agreement, however, did not preclude EPA from seeking further review of the March 1, 1982 order. EPA advised the court that "the government does not agree that an assessment of fees against the government in these circumstances is appropriate and payment to NPRC is without prejudice to the government's right to seek further review." (App. A at App. 2). NPRC confirmed this understanding by stating to the court of appeals that EPA reserved its right to seek review *only* of the March 1, 1982 order (App. B at App. 4). Even though a settlement had been achieved, the court of appeals did not order the payment of those fees until March 3, 1983 (Pet. App. B).

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REASON FOR DENYING THE PETITION

EPA has failed to file its petition for a writ of certiorari in a timely fashion and it must therefore be denied.

A petition for a writ of certiorari in civil cases in the courts of appeals must be filed within ninety days after the entry of the decree sought to be reviewed. 28 U. S. C. § 2101(c). This Court lacks jurisdiction over any petition filed beyond the ninety day period, unless an extension is sought and granted.[1] *Department of Banking v. Pink*, 317 U. S. 264 (1942); *Toledo Scale Co. v. Computing Scale Co.*, 261 U. S. 399, 418 (1923); *Matton Steamboat Co. v. Murphy*, 319 U. S. 412, 415 (1943).

Rule 20.4, Sup. Ct. R. (1983), provides that:

> "The time for filing a petition for writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered. . . ."

EPA is seeking review of the court of appeals order of March 1, 1982, awarding attorneys fees to NPRC. EPA does not dispute or question the specific amount of those fees. (See Pet. at (I)). Indeed, EPA has taken the position before the court of appeals that it would seek review only of the March, 1982 order. According to Rule 20.4, Sup. Ct. R. (1983), EPA's application for a writ of certiorari should have been filed within ninety days of March 1, 1982.

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1 Section 2101 (c) of Title 28 permits an extension of time to apply for a writ of certiorari of up to sixty days. No extension has been sought in this case.

Decisions of this Court demonstrate that EPA has filed an untimely petition for a writ of certiorari. In *Federal Trade Commission v. Minneapolis-Honeywell Regulator Company,* 344 U. S. 206 (1952), this Court rejected the proposition that subsequent proceedings before the court of appeals, which did not affect any rights already adjudicated, would extend the time period in which to apply for certiorari. That case grew out of a proceeding before the Federal Trade Commission wherein a three count complaint was issued against Minneapolis-Honeywell Regulator Co.[2] The Commission, after hearing, ruled against Minneapolis-Honeywell on all three counts and entered a cease and desist order. Minneapolis-Honeywell sought review in the Court of Appeals for the Seventh Circuit. Before that court, Minneapolis-Honeywell abandoned its challenge to counts I and II; the court of appeals reversed the Commission on count III. The Commission thereafter requested the court of appeals to affirm the first two counts which the court did. In so affirming, the court of appeals again stated that count III was reversed and dismissed. The Commission then sought certiorari. Significantly the Commission's petition was filed within ninety days of the order affirming counts I and II, but well beyond ninety days of the entry of the first order dismissing count III. Minneapolis-Honeywell raised the issue of the timeliness of the Commission's petition for a writ of certiorari. The Commission argued to this Court that its request to the court of appeals to

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2 Count I charged violations of the Federal Trade Commission Act, Count II, the Clayton Act, and Count III, the Robinson-Patman Act. *Federal Trade Commission v. Minneapolis-Honeywell Regulator Company,* 344 U. S. at 207.

affirm counts I and II extended the time period to seek certiorari. This Court rejected that argument:

> "... we cannot hold that the time for filing a petition for certiorari was enlarged simply because this paper may have prompted the court below to take some further action which had no effect on the merits of the decision that we are now asked to review in the petition for certiorari."

344 U. S. at 211.

Department of Banking v. Pink, 317 U. S. 264 (1942), was a review of a New York case. The New York Court of Appeals remitted the case to the New York Supreme Court; the Department of Banking sought to amend the remittitur by adding to it a statement that a federal question had been raised and passed upon. The remittitur was so amended and the Department sought a writ of certiorari. This Court stated that the Department's petition was timely only if the amendment to the remittitur operated to extend the time to apply for a writ of certiorari. Because the Department's amendment "did not seek to have the Court of Appeals reconsider any question decided in the case," 317 U. S. at 266, it did not operate to extend the time to seek certiorari. Hence, because the amendment did not affect any rights already adjudicated, the subsequent proceedings did not delay the running of the ninety day period.[3]

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3 See also *Federal Power Commission v. Idaho Power Co.*, 344 U. S. 17 (1952), wherein the court of appeals first remanded a Federal Power Commission order and then modified it. An issue was raised with respect to when the period within which to apply for certiorari began (i. e., from the first court of appeals order, or from the second). This Court granted

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As these cases show, proceedings subsequent to the entry of an order will not operate to extend the time in which a petition for a writ of certiorari must be filed unless those proceedings affect the merits or the rights adjudicated in the initial order. In the present case, the court of appeals March 1, 1982 order adjudicated the question of whether EPA should pay NPRC's attorneys fees. The subsequent proceedings merely confirmed the agreement between EPA and NPRC that reasonable attorneys fees would total $15,000. Clearly, the subsequent proceedings did not in any manner affect the determination that attorneys fees would have to be paid. In fact, EPA has, since March 1982, taken the position that it would seek review only of the March 1, 1982 order (Apps. A and B). Accordingly, the petition for a writ of certiorari seeking a review of the question of whether attorneys fees should be paid by EPA had to have been filed no later than May 31, 1982. Plainly, EPA's petition was not timely filed and therefore this Court has no jurisdiction to grant review.

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CONCLUSION

The petitioner, United States Environmental Protection Agency, has failed to file its petition for a writ of certiorari within ninety days of the entry of the order awarding the Northern Plains Resource Council its attor-

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certiorari reasoning that since the second order actually modified the first, the time period would begin to run on the entry of the second order. 344 U. S. at 20.

neys fees. The petition is therefore untimely, and should, for that reason, be denied for lack of jurisdiction.

DATED June 9, 1983.

Respectfully submitted,

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Attorney of Record

JEFFREY T. RENZ

PATTEN & RENZ

Attorneys for the Northern Plains Resource Council

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-7618

NORTHERN PLAINS RESOURCE COUNCIL, INC.,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent,

MONTANA POWER COMPANY, et al.,

Intervenors.

RESPONDENT'S RESPONSE TO PETITIONER'S MOTION SPECIFYING ATTORNEYS' FEES

On March 1, 1982 the Court entered an order in the above-captioned case requiring the respondent United States Environmental Protection Agency ("EPA") to pay petitioner Northern Plains Resource Council ("NPRC") attorneys' fees. In accordance with the March 1, 1982 order[1] NPRC filed its motion specifying fees on March 15, 1982 in which it requested $40,926.75 EPA hereby responds to NPRC's motion.

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1 The March 1, 1982 order gave NPRC 14 days therefrom to file its motion and the government 14 days from the date of NPRC's filing to respond.

Counsel for respondent has conferred with counsel for NPRC regarding this matter. Said counsel have agreed that the government will pay counsel for petitioner $15,000 and that counsel for NPRC will submit an amended motion for fees to the Court. However, it is understood that although agreement has been reached as to the amount of an award to NPRC, the government does not agree that an assessment of fees against the government in these circumstances is appropriate and payment to NPRC is without prejudice to the government's right to seek further review. In fact, the government is considering seeking rehearing but has agreed that it will pay NPRC $15,000 now because we believe it would be inequitable to delay payment during any further proceedings.

Respectfully submitted,

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APPENDIX B

IN THE COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-7618

NORTHERN PLAINS RESOURCE COUNCIL,

Petitioner,

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent,

MONTANA POWER COMPANY, et al.,

Intervenors.

AMENDED MOTION FOR FEES

Comes now the Northern Plains Resource Council, the Petitioner herein, and hereby amends its motion specifying the attorneys' fees in the above-entitled matter. The grounds for this amended motion are as follows:

1. On March 1, 1982 this Court entered an order awarding the Petitioner Northern Plains Resource Council its reasonable attorneys' fees incurred in the above-entitled proceeding. Pursuant to that order, the Petitioners submitted a motion specifying fees in the amount of $40,926.75.

2. Counsel for Petitioners has discussed with counel for the Respondent the attorneys fees in this matter and the parties have agreed that the Respondent will pay

to the Petitioner the sum of $15,000 as reasonable attorneys fees.

3. The Respondent has reserved its right to seek further review of this Court's Order of March 1, 1982. The Petitioner similarly reserves its rights to seek an award of additional attorneys' fees if such are incurred in responding to further or additional reviews of this Court's order awarding attorneys' fees.

WHEREFORE, the foregoing reasons, the Petitioners herein respectfully request an award of $15,000 as reasonable attorneys' fees in this matter.

Respectfully submitted this 31st day of March, 1982.

PATTEN & RENZ

by: /s/ J. A. PATTEN
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